No. 126, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

NEBRASKA'S BRIEF IN REPLY TO EXCEPTIONS BY KANSAS

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INTRODUCTION

Kansas asserts it brought this litigation "not so much to seek recompense for past harm as to prevent future harm." Kansas Brief in Support of Exceptions ("Kansas Brief") at 13. Kansas' actions suggest otherwise.

In 2008, the Kansas Legislature passed Senate Bill 89. Kan. Stat. Ann. § 82a-1804 (2008). This legislation created a plan for Kansas to spend money it would seek through litigation against Nebraska and Colorado. The Kansas law would reload the state's "Interstate Litigation Fund," up to $20,000,000 to be used for future water-related litigation. After the fund reached $20,000,000, the law assigned one-third of the remaining litigation recoveries to the State Water Plan Fund for statewide water development projects. Notably none of the funds were to be directed to repayment to the farmers whose harm would form the basis of any recovery. In 2010, fewer than two years after Kansas adopted § 82a-1804, Kansas initiated this litigation against Nebraska seeking roughly $80,000,000 in damages for Nebraska's 2006 Compact violation.

Kansas continues to seek a monetary award far in excess of the actual damages its irrigators suffered. To bolster its claims, Kansas recklessly asserts Nebraska continues to violate the Compact. That assertion is flatly false. Nebraska's only violation occurred in 2006 and that was readily acknowledged by Nebraska. No other violations have occurred. Had

Nebraska violated the Compact in other years, Kansas would have brought claims for those years or otherwise alerted the Special Master to those transgressions.

When the States entered the Final Settlement Stipulation (Dec. 15, 2002) ("FSS") in 2002, they all understood it would take several years for Nebraska to adopt and implement a new statutory framework to manage hydrologically-connected water supplies for Compact compliance. To implement Nebraska's new regulatory structure, the States agreed 2006 would be the first Water-Short Year Administration compliance test under the new "Accounting Procedures" found in Appendix C of the FSS. The full schedule for implementation of the FSS is set forth in Appendix B of the FSS.

Indeed, 2006 was a Water-Short Year due to an unprecedented drought marked by conditions worse than the Dust Bowl. And although Nebraska used more water than its allocations from 2003 to 2006, such overuse was authorized, provided Nebraska achieved compliance over multiple averaged years starting in 2006 – which is why Kansas did not bring suit regarding those early years.

Despite Nebraska's best efforts, which included a wholesale re-writing of its state water laws in 2004, Nebraska used more water than it was allocated under the 2006 average year compliance test, which Nebraska never denied. Nebraska's overuse in 2006 was determined by Special Master Kayatta to be 70,869 acre-feet of water, which is the sum of the

individual two years (2005-2006) of the Water-Short Year Administration test.[1] Report of the Special Master (Kayatta) (Nov. 15, 2013) ("Final Report") at 98.

Oddly, Kansas brought this action in 2010, well after Nebraska had achieved compliance and after Nebraska had substantially revised its compliance plans in the wake of the violation. Indeed since 2007, Nebraska has been in compliance with the Compact every year even without the benefit of the necessary accounting corrections the Special Master recommends be resolved in Nebraska's favor. Nebraska's exceptional efforts at achieving compliance have been costly and difficult and, as Special Master Kayatta noted: "Nebraska has presented a credible case that it began turning over a new leaf in 2007 and thereafter, planning for compliance with more care and urgency." Final Report at 180. In short, the Special Master found there was no evidence to support Kansas' "anticipatory breach" theory that supported the other relief it now seeks through its Exceptions. As the Special Master correctly found, Kansas' claims for heightened damages and injunctive relief are supported neither by evidence nor law and should be rejected.

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[1] While Nebraska contended it could be liable only for the *average* of the two years involved in the Water-Short Year average, Nebraska has not taken exception to the Special Master's conclusion because it does not appear this issue will be relevant in the future. Nebraska's willingness to concede this point is testament to its confidence that it will comply with the Compact in the future.

As to Nebraska's Counterclaim, the Special Master correctly recommends the Republican River Compact Administration ("RRCA") Accounting Procedures (Appendix C to the FSS) be modified to ensure they reflect the Parties' intent as expressly stated within the four corners of the FSS itself. Kansas casts this as judicial reformation of the "deal" struck and embodied in the FSS. But, Kansas misrepresents the terms of the actual deal. There is no question, as reflected in the plain language of the FSS, that the Parties agreed imported water supplies (i.e., water from the Platte River Basin) would *not* be subjected to consumption and included as part of Nebraska's Computed Beneficial Consumptive Use ("CBCU") under a Compact that divides the waters of the Republican River Basin. FSS § IV.F.

Nebraska has proved beyond any doubt that the Accounting Procedures are, in fact, resulting in the consumption of imported Platte River water as if it were Republican River water in direct contravention of § IV.F. There is no dispute about this fact. Kansas asserts this untenable result – which the Parties expressly stated could *not* happen – is just an implicit benefit Kansas received as part of the grand bargain embodied in the FSS and should be preserved because Kansas gave up a lot of other things in the fray. Yet, even Kansas does not suggest it cleverly manipulated the RRCA Groundwater Model ("Model") after the FSS was signed to game the system to get a better deal. Nor does Kansas assert it overtly negotiated for that result.

Instead, Kansas suggests some outside technical consultants might have known about certain non-linear aspects of the Model, which might produce odd results in certain limited cases, which in turn might result in the consumption of imported water. Even this tenuous assertion is unsupported by the evidence, which shows none of the States understood the magnitude of the problem Nebraska ultimately discovered and presented to the RRCA in 2007. The Parties were, as the Special Master concludes, simply mistaken about the effect of the Accounting Procedures, which do not effectuate the intent expressed in § IV.F. The current procedures, in fact, contradict the clear language of the FSS.

Thus, the Special Master's recommendation is better described as one to *conform*, rather than reform, the Accounting Procedures, which are working against the Parties' real "deal" so much so that Kansas is now receiving an allocation of Platte River water under the Compact – an absurd result that no one, including Congress when the Compact was signed, and this Court when the FSS was approved, ever intended to sanction.

As the Special Master's analysis determined, there is no compelling evidence to support Kansas' position that the States were even generally aware that the Accounting Procedures resulted in the consumption of non-Compact water when they signed the FSS and thus agreed to § IV.F. In fact, the evidence shows neither Kansas nor Nebraska was aware of how the Accounting Procedures would account for

imported water under all circumstances once the Model was finalized.

Rejecting Kansas' argument that the impacts were well known, Special Master Kayatta found: "Nor is there any evidence that either Nebraska or Kansas was aware prior to 2007 that the specific Accounting Procedures upon which they agreed in 2003 had the effect of which Nebraska now complains." Final Report at 26. This is necessarily true because the Model was not completed until six months *after* the FSS and the Accounting Procedures. Final Report at 21. Thus, the Model was not run until the Accounting Procedures had already been finalized. Only the following summer could anyone have possibly understood the result of running the Model. So, it was impossible for Kansas (or anyone) to know that the consumption of imported water would be charged to Nebraska when the FSS (including Appendix C) was signed and approved by the Court.

STATEMENT

Nebraska generally rests on the Statement contained in its Brief in Support of Exceptions, here supplementing it only to provide background related to the Special Master's recommendation that the RRCA Accounting Procedures be modified.

In Kansas' 1998 litigation, Kansas sought to modify the Compact accounting rules, to which it previously agreed, to include the impact on stream

flow caused by groundwater wells. Final Report at 5-6. In that action, Nebraska argued, as Kansas here does, that altering the rules requires the unanimous action of the RRCA. In finding for Kansas and modifying the accounting rules, then-Special Master Vincent McKusick found the RRCA rules could not effect an accounting contrary to the plain intent of the Compact.

In its latest litigation, Kansas fought what it previously demanded – to change an accounting error that is contrary to the plain language of the Compact. Special Master Kayatta's analysis was similar to his predecessor, and he examined the plain language of the Compact along with the language and history of the FSS to conclude that water imported to the Republican River Basin from another interstate stream is beyond the scope of the Compact and the FSS, and that Nebraska should not be charged for its consumption.

Rather, the FSS ensures "[c]redit shall be given for any remaining Imported Water Supply that is reflected in increased stream flow " FSS § IVF. *See also* FSS § II (Definitions) ("The Imported Water Supply Credit of a State shall not be included in the Virgin Water Supply and shall be counted as a credit/offset against the Computed Beneficial Consumptive Use of that State's Allocation "); Special Master McKusick Second Report at 64 (explaining same). *See also* FSS § II (Definition of Water Supply of the Basin or Water Supply Within the Basin). There is no dispute about the intent to provide

Nebraska with this credit. Tr. of 8-2012 hearing at 352 (Larson). In other words, imported water is not part of the Virgin Water Supply ("VWS") as that term is defined in the Compact, and Kansas has no right to that water because Nebraska brought it to the Republican River Basin.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY DETERMINED THAT NEBRASKA WAS BEING WRONGLY CHARGED WITH THE CONSUMPTION OF NON-COMPACT WATER.

Kansas' first exception urges the Court to reject Special Master Kayatta's purported recommendation that *§ IV.F.* be modified to avoid charging Nebraska with the consumption of non-Compact water. Kansas Brief at 11. But the Special Master did not recommend modification of § IV.F. To be clear, Special Master Kayatta has not suggested the FSS itself be reformed or that § IV.F be modified. Rather, he has recommended the Accounting Procedures contained in Appendix C be modified to *conform* to § IV.F's express prohibition on the consumption of imported water supplies.

As set out in Appendix G of the Final Report, Kansas' technical and legal positions on this issue have conveniently shifted and changed since Nebraska first identified the issue in 2007. Kansas' technical

experts, however, have never denied that the existing Accounting Procedures result in Nebraska being charged with the consumption of water that is imported from outside the Basin – i.e., non-Compact water. Devoid of any factual basis to reject the Special Master's recommendation, Kansas resorts to its "central argument that a deal is a deal" even if it is contrary to the express terms of the Compact and intent of Congress in adopting it. Final Report at 37.

The Special Master is not "second guessing" the States in the deal they negotiated. Kansas Brief at 21. Rather the Special Master is attempting to ensure the States' deal is actually implemented as intended.

A. There is No Factual Dispute that Nebraska is Being Charged for Consumption of Non-Compact Water.

All the parties agree Nebraska imports water from the adjoining Platte River Basin into the Republican River Basin. Water diverted from the Platte River leaks from irrigation canals, and from irrigation activities, near the northern part of the Republican River Basin and, over time, that water migrates into the Republican River Basin where some of it is withdrawn and used again for irrigation. Kansas Brief at 7. The Platte River is also an interstate stream and knowledge of the importation of its water to the Republican River Basin resulted in the compacting States agreeing in the FSS to prohibit the imported (non-Compact) water from being charged to Nebraska.

What was not known until 2007, was that since their inception in 2003, the Accounting Procedures as implemented through application of the Model, inadvertently charged Nebraska with the consumption of substantial amounts of imported water. In 2007, when Nebraska first observed the phenomenon and raised its concerns to the RRCA, it provided a detailed description of the problem and a solution (which ultimately became known as the "5-Run Solution") for its correction. Nebraska's solution, however, was rejected by Kansas as were subsequent alternative attempts to correct the problem. When Kansas sought to arbitrate the 2006 damage claim against Nebraska, Nebraska simultaneously arbitrated its claims regarding the Accounting Procedures. The arbitrator concluded that indeed, Nebraska was being wrongly charged for the consumption of non-Compact water although he urged the States to craft a joint technical solution through the RRCA's Engineering Committee. *See* J7, JT 3246. When Kansas filed its Motion for Leave to File Petition, Nebraska responded by alerting the Court to this very issue, and indicating its intent to file its counterclaims against Kansas. *See* Brief of Nebraska In Response To Kansas' Motion For Leave to File Petition at 24-26, App. 17-22.

At the hearing before Special Master Kayatta, Colorado's expert Dr. Willem Schreüder testified he concurred with Nebraska's position. The Special Master explained: "Schreüder, who has maintained the official (RRCA) version of the Groundwater Model

and performed the annual updates to the Model since 2003 (Schreüder Direct at 2), agreed with Nebraska's experts that, '[u]nder the current accounting procedures, Nebraska is charged for the consumption of imported water as CBCU [Computed Beneficial Consumptive Use]' (*id.* at 9). Final Report at 33.

In contrast to Colorado's response, Kansas provided a less-than-forthright response, as set forth in limited detail in Appendix G of the Final Report. At the hearing before the Special Master, Kansas largely tried to dodge the point altogether. Kansas' testimony led Special Master Kayatta to observe:

> Illustrative of Kansas' limited response is the testimony of its expert, Larson. Larson was on the Kansas team that negotiated components of the FSS, including the Ground water model. He subsequently was retained by Kansas in 2007 Larson did not state whether he agreed or disagreed with the factual assertion that the current Accounting Procedures treat the consumption of some imported water under dry conditions as if it were the consumption of virgin water supply under the Compact. When asked at point blank whether he challenged that assertion, he replied that 'I'm not sure,' though he acknowledged that it was possible that Nebraska was being charged for consumption of imported water supply. He implausibly claimed that in the more than five years during which Nebraska has sought various remedies based on its claim he has not addressed the assertion directly 'because I

> think it takes a fair amount of model run evaluation to do that: and I haven't been able to do that.

Final Report at 35-6. (Internal citations omitted).

The Special Master also found that for 2006, the amount of imported water wrongly charged to Nebraska was 7,797 acre-feet. *See* Final Report at 37.[2] While the actual amount will vary over time, calculations indicate the amount will grow annually in future years. Over time, this accounting error will deprive Nebraska of far more water than Kansas claims it was denied by Nebraska's violations. C-10 at Page 60 of 60 (Average 2003-2059 of 11,600 acre-feet annually and approximately 650,000 acre-feet over that period). In short, the magnitude of the accounting error is significant enough to regularly impact Nebraska's compliance status, and there is no factual dispute that the error is real.

B. The Compact Only Regulates Water Originating in the Republican River Basin.

Kansas' argument necessarily requires this Court to hold that States can regulate waters from river basins *beyond* the Republican River through a settlement agreement that was not approved by

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[2] Actually, the amount of consumption is approximately twice this number. *See* N1004 at 6. The Special Master's figure represents the net negative effect on Nebraska's Compact balance for 2006.

Congress. In other words, Kansas argues the States intended to accomplish through the FSS what they were otherwise precluded from achieving absent a compact. Kansas is wrong.

The Compact provides a clear definition of the Basin from which Congress intended the waters to be apportioned. *See* Art. II, and map of Basin at Final Report, C1. Congress (and each of the compacting States' legislative bodies), defined the "Virgin Water Supply" to be "the water supply within the Basin undepleted by the activities of man." *Id.* In adopting the Compact, the clear intent of Congress was to strictly limit the scope of the regulatory restrictions only to the waters of the Republican River Basin. There is no indication in the plain language of the Compact, the history of the Compact's development, or its historical administration that could remotely suggest Congress intended to subject waters from *other* river basins to regulation under the Compact. Special Master Kayatta understood this and correctly found:

> The Compact only regulates water 'originating in' the Republican River Basin. Compact art. III (noting that the states' allocations are to be 'derived from the computed average annual virgin water supply originating in' the Basin). It therefore does not regulate the use of water imported from outside the Basin, including the water imported from the Platte River.

Final Report at 23.

Water imported into the Republican River Basin is therefore non-Compact water. Absent additional Congressional action to include such water, it cannot be subjected to regulation under the Compact. Kansas cites no authority to support its position that the non-Compact water of another interstate river can be subjected to Compact regulatory authority by contract. Kansas' exception should be dismissed on this basis alone.

As the next section shows, even if the States could have agreed to regulate the waters of another interstate stream without Congressional consent, there is no evidence to indicate the States intended to so do.

C. The States Did Not Intend to Apportion or Regulate Non-Compact Water Through the FSS.

On one hand, Kansas argues the FSS was an "extraordinary accomplishment" derived from "technically extensive negotiation" that "produced a comprehensive and technically detailed settlement agreement. " Kansas Brief at 4. On the other, Kansas asks this Court to believe that, although all these highly specialized negotiators fully understood that the non-linearity of the Model would result in potential consumption of imported water supplies, not one of these sophisticated experts and negotiators

ever actually attempted to explicitly articulate and address this critical point.[3] To appreciate the absurdity of this assertion, the Court need only review what the Parties actually did expressly agree to: § IV.F of the FSS.

There is no evidence to find, nor did either Special Masters McKusick or Kayatta believe, anything in the FSS was intended to charge a party with consuming imported water. Kansas was seemingly in agreement with this conclusion at various times throughout this dispute. Yet when faced with uncontroverted evidence that Nebraska was being so wrongly charged, Kansas argued that either Nebraska's proposed solution was inadequate to correct the problem or legally beyond bounds of this Court's authority. *See* Final Report, App. G.

Special Master Kayatta conducted an exhaustive review of the historical record surrounding the development and approval of the FSS and gave Kansas extraordinary opportunities to present additional evidence to support its various theories. Indeed this

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[3] Specifically, Kansas asserts "the parties recognized that, during dry periods, tributary systems could and did dry up, *which meant* that if imported water flowed into the otherwise dry streams it might be counted as part of Nebraska's consumption." Kansas Brief at 7 (emphasis supplied). This is completely false. There is no evidence that anyone understood the *meaning* of stream drying in this context. Had anyone understood that substantial amounts of imported water would be consumed in this situation, FSS § IV.F would not have prohibited the exact opposite result.

entire proceeding was extended for a full year to accommodate Kansas' professed need to develop additional evidence. *See* Final Report, App. G.

Special Master Kayatta's review of evidence included the transcripts of the hearings before Special Master McKusick. He also heard testimony from Kansas witnesses who included all of the Kansas negotiators leading to the FSS and the technical consultants who helped develop § IV.F and the Accounting Procedures. At the hearing, Special Master Kayatta was able to make personal observations and draw independent conclusions as to their expertise and veracity (or lack thereof). He also had available to him the insights of his predecessor in the prior litigation, Vincent McKusick, who was in the same firm with Special Master Kayatta.

To form an understanding of the States' intent when they entered the FSS, Special Master Kayatta reviewed the Second Report of Special Master McKusick. In his Second Report, Special Master McKusick made very clear how imported water was to be treated by the FSS: "The Final Settlement Stipulation resolves this issue by providing that *beneficial consumptive use of imported water will not count as computed beneficial consumptive use or as virgin water supply*." Second Report of the Special Master (McKusick) (April 15, 2003) ("Second Report") at 64 (emphasis supplied).

As evidenced by the Final Report, Special Master Kayatta's analysis did not stop at the plain language of the Second Report. Delving into the hearing record

that supported and led to Special Master McKusick's Second Report, Special Master Kayatta concluded the States "clearly" did not intend to treat any material amount of water from the Platte River as being subject to Compact accounting. *See* Final Report 23-32. He further explained:

> In entering into the FSS, no state sought to expand the reach of that regulation by venturing outside 'the boundaries of the Compact.' (Second Report at 2.) To the contrary, the states represented that '[t]he States agree that [imported] water should not count as virgin water supply or as a computed beneficial consumptive use. (J6 at JT3086).

Final Report at 23-4.

The Special Master continued, finding: "The FSS unambiguously specifies that 'Beneficial Consumptive Use of Imported Water Supply shall not count as Computed Beneficial Consumptive Use or Virgin Water Supply.' (FSS at § IV.F)." *Id.* at 24. It now appears the only person who was even conceptually aware of the accounting implications was Colorado's expert, Dr. Willem Schreüder. Since 2003, Dr. Schreüder has been a paid consultant to the RRCA responsible for operating the groundwater model for all of the States, including Kansas. Reflecting back on the development of § IV.F and its impact on imported water, Dr. Schreüder testified: "we didn't believe that that [charging for the consumption of imported water] was going to be a big deal." Tr. 8-2012 hearing at 676-77 (Schreüder). When pressed by Kansas' counsel

why he now believed it is "a big deal," Dr. Schreüder explained:

> Your Honor, as a scientist, when new facts come to life, you have to adjust your opinion and, you know, Nebraska has made a demonstration that, in fact, this issue is of greater magnitude than I anticipated it and so as a result, I have changed my position.

Id. at 677 (Schreüder).

After considering the testimony from each of the States' expert witnesses, Special Master Kayatta rejected Kansas' claims and concluded:

> There is no evidence that anyone else was even intellectually aware of any possibility that the accounting procedures being adopted could work at material cross purposes in any way with the parties' agreement that use of imported water not count as use of virgin water. And certainly there is no evidence of any discussions implying such an awareness.

Final Report at 26.

Contrary to Kansas' latest assertions that its expert, Mr. Larson, was keenly aware of the effect the Model would have when employed as per the Accounting Procedures, the evidence supports a much different conclusion. Unimpressed with the direct testimony of Mr. Larson, Special Master Kayatta observed: "Even as late as 2013, Kansas' hydrogeological expert Steven Larson professed not to know whether the Accounting Procedures had the effect of which Nebraska

complains." Final Report at 26-7. Yet while Kansas now claims it knew of the effect when it entered the FSS in 2003, the Special Master found that "[w]hen Nebraska in 2007 distributed its paper announcing that it had discovered the effect at issue, no one – including Kansas – suggested that the effect had been anticipated." Final Report at 27.

Kansas' argument ignores the fact that it was *impossible* to know non-linear aspects of the Model would result in improper consumption of imported water because the Model was not completed (and thus not employed) until six months after the FSS was signed. Kansas' argument also contradicts its own acknowledgement of what the Model and Appendix C are designed to achieve. Kansas recognizes the Model and the Accounting Procedures "have two primary goals: to reasonably (1) replicate the Basin's actual physical and hydrologic conditions; and (2) account both for accretions resulting from imported water and depletions caused by groundwater pumping." Kansas Brief at 7 (internal citations omitted). In virtually the next breath, Kansas contends its negotiators and experts knew these "primary goals" could not be achieved because the Accounting Procedures were a bargained-for compromise for other *unspecified* exchanges. The Special Master, however, found: "There is no evidence, though, that the parties intended the FSS to substitute for actual conditions an artificial construct that materially varies from reality." Final Report at 24.

Digging deeper into the Kansas claim that the accounting deficiencies were part of some grand (and partially unstated) bargain, the Special Master similarly concluded:

> [T]here is simply no evidence that an unexplained deviation from a foundational principle [that the consumption of imported water not count against a state] was part of one such bargain. To the contrary, the testimony of Kansas witnesses Pope and Laron [sic] make clear that Kansas was not aware in 2003 that the procedures would treat the consumption of imported water in some circumstances as if it were the consumption of virgin water supply. (Tr. at 873-77 (Pope).)

Final Report at 28.

Fully exploring Kansas' contentions, Special Master Kayatta reasoned that if the accounting problems had been known to Kansas during the time the FSS was being negotiated, any indication that Kansas would withdraw its agreement to the FSS in response to attempts to correct the Accounting Procedures, could reasonably be viewed as supporting evidence. No such evidence was presented by Kansas leading the Special Master to conclude:

> What is entirely missing from even this belated testimony is any evidence that Kansas would have withdrawn its agreement to the FSS had the mistake in the Accounting Procedures been corrected during the negotiations. To the contrary, when unfettered by

> leading questions from his counsel, Pope made clear that the parties, including Kansas, viewed the development of the model and the procedures as a good faith effort to implement the agreed upon principles set forth in the FSS.

Final Report at 31.

Having had the opportunity to study all of the evidence and observe the witnesses, Special Master Kayatta unequivocally found: "[O]n the subject of how to account for consumption, the parties agreed on basic principles, including that the consumption of imported water [non-Compact] not be treated as the consumption of virgin water, and they intended that the Accounting Procedures reflect and implement those principles." Final Report at 32.

The mutual mistake of the States is, therefore, adoption of Accounting Procedures that, when implemented with the Model, wrongly charge Nebraska for the consumption of imported (non-Compact) water. Like Nebraska, Kansas did not, and could not, fully understand how the Accounting Procedures, when paired with the Model completed six months after the "deal" was struck, would impact the accounting of imported water. If Kansas' negotiators did understand the impact on imported water, Kansas effectively perpetrated a fraud on the other States to exercise control over waters to which Congress had not authorized. Again, however, Kansas' witness Mr. Pope vehemently disclaimed any intent to manipulate the Model to intentionally controvert the

plain language the parties settled on in § IV.F. Tr. of 8-2012 hearing at 876-77. Indeed, Mr. Pope – Kansas' lead negotiator – was never even aware of the issue and, thus, could not have negotiated for it.

Finally, even at this late date, Kansas tries to elevate form over function by suggesting Nebraska failed to properly plead mistake. Kansas Brief at 10-11. A plaintiff (or counterclaimant in this case) must provide only enough detail to give a defendant fair notice of the claim and the grounds upon which it rests, and, through the allegations, show that it is plausible, rather than merely speculative, that the plaintiff is entitled to relief. FED. R. CIV. P. 8(a) and (d); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Nebraska's Amended Counterclaim sets forth the problem with the Accounting Procedures and the impact of improper consumption. Kansas was provided fair notice that a mistake was involved also by virtue of Nebraska's immediately preceding Affirmative Defenses, which expressly include "Mistake." Answer and Amended Counterclaims and Cross-Claim of the State of Nebraska, Fourth Affirmative Defense (Mistake) ¶ 53 ("This failure is contrary to the understanding of, and was unforeseen to the States at the time they adopted the FSS and Accounting Procedures."). The Court may construe a pleading "mistakenly" designated a defense as a counterclaim (or vice versa) when justice requires. FED. R. CIV. P. 8(c). Given Kansas' longstanding notice of the issue, Nebraska's labeling the mistake as an affirmative defense did not prejudice Kansas in any way. *Compare*

Resolution Trust Corp. v. Midwest Federal Sav. Bank of Minot, 36 F.3d 785, 791-2 (9th Cir. 1993) (noting "mutual mistake" is an affirmative defense and treating counterclaim pled as "mutual mistake" as an affirmative defense).

Despite its protestations here, Kansas officials knew since 2007 that Nebraska was arguing that a mistake resulted in charging Nebraska with consumption of imported water, and Nebraska proposed to resolve it using the Five-Run Solution. *See* Kansas Brief at 9. Again, a review of the Appendix G of the Special Master's Final Report will highlight some of the gyrations Kansas officials took to prevent this issue from being squarely addressed. But it was clearly set forth in 2007. It was arbitrated in 2008. It was stated in Nebraska's Counterclaim. And it was litigated for years thereafter (including an additional yearlong extension afforded Kansas expressly to avoid any prejudice).

D. Kansas is Not Harmed by the Modification to Appendix C.

Kansas asserts it would be harmed by an Order conforming the Accounting Procedures to the express language of § IV.F by implementing Nebraska's Five-Run Solution. Kansas Brief at 33 (" under the 5-Run Proposal, Kansas will receive less water than under the current procedures."). And with this note, the true reason for Kansas' obstinacy is laid bare. The problem is that Kansas is not entitled to *Platte* River

water. Modifying Appendix C to eliminate the improper charge for consumption of this non-Compact water does not diminish the amount of *Republican* River water to which Kansas is entitled. Rather, it simply removes a benefit Kansas has been inequitably enjoying by virtue of the Parties' mutual mistake. This benefit is derived solely at Nebraska's expense and amounts to an estimated average of approximately 11,600 acre-feet per year between 2003 and 2059. C-10 at Page 60 of 60. Correcting the VWS by eliminating the consumption of non-Compact water (thus reducing Nebraska's total CBCU) should not be considered "harm" to Kansas, because Kansas was never entitled to an allocation of water from the Platte River in the first place.

Nor is it equitable to perpetuate accounting procedures that artificially inflate Nebraska's CBCU, thereby granting Kansas the ability to claim damages or other injunctive relief on that basis. By charging Nebraska for consumption of non-Compact (imported) water, the Accounting Procedures have overestimated Nebraska's CBCU by over 15,000 acre-feet annually on average from 2001-2006. Direct Testimony of Willem Schreüder (July 19, 2012) at 7. Failure to remediate the mistake not only allows Kansas to retain the benefit of the mistake for past violations, but awards Kansas an inequitable share of the water of the Basin in the future.

E. Kansas' Refusal to Correct or Even Seriously Consider Modification to Appendix C Violates Its Article IX Compact Obligation.

In 2007 Nebraska presented clear evidence that the States made a mutual mistake because the Accounting Procedures operate contrary to the Compact and the FSS. Kansas, however, responded in various ways designed to avoid addressing this serious issue, and relied on it to inflate its claim for non-compliance and resulting damages. The Special Master recognized Kansas' cavalier treatment of its sister State and chronicled only a portion of it in Appendix G of the Final Report.

Article IX of the Compact states: "It shall be the duty of the three States to administer this compact , and to collect and correlate the data necessary for the proper administration of the provisions of th[e] compact." This provision imposes an affirmative obligation on each State to carefully account for the water and administer the Compact. Despite his failure to take any serious effort to consider Nebraska's proposals, Kansas' RRCA representative, Mr. Barfield, essentially acknowledged this duty. *See* Tr. 8-2012 hearing at 486.

Not every flaw in the Compact's administration can be known, and the States should always endeavor to improve. But, Nebraska and Colorado have identified a problem with the Accounting Procedures, resulting in a direct contradiction of the plain language of the Compact and FSS. Continued operation

under the Accounting Procedures is undeniably resulting in improper administration of the Compact.

Nebraska presented the problem at various meetings of the RRCA and the RRCA Engineering Committee, and sought to ensure the Compact is properly administered since at least 2007. N1000 (Schneider Direct) ¶¶ 2, 9. In open disregard for its responsibilities to the other States, Kansas simply refused to analyze Nebraska's Five-Run Proposal. When pressed, it became clear that Kansas' lead expert (at least since 2008) had never even been directed by Kansas to analyze the Five-Run Solution. Tr. of 8-2012 hearing at 378 (Larson). Had Kansas any intent other than obfuscation, it would have directed Larson to make some effort to analyze the proposal beginning in May 2012, when it was formally presented to Special Master Kayatta.

If Article IX means anything, it must mean that when confronted with an instance of clearly improper administration, the States must undertake a serious analysis of that problem to discharge their administrative duties. Yet again, Kansas' objection to the Five-Run Solution appears to be simply that "a deal is a deal." Tr. of 8-2012 hearing at 353 (Larson). The only real technical response to it (the use of an uncalibrated baseline) was illusory. The fact is that the baseline employed in the current Accounting Procedures and Nebraska's Five-Run Proposal is functionally identical. *Id.* at 353-7 (Larson). Indeed, Colorado, which once shared the concern about the use of an uncalibrated baseline in Nebraska's prior

Sixteen-Run Proposal, recognizes this concern has been eliminated in the Five-Run Solution. *Id.* at 715-6 (Schreüder). As to all other concerns raised by Kansas, it has made no analytical effort to determine whether those concerns were valid. *Id.* at 357-60 (Larson).

More importantly, Nebraska's accounting issue remains exactly what it always has been since 2007: The RRCA Accounting Procedures fail to do their job in a manner consistent with the FSS and Compact. N1000 (Schneider Direct) ¶¶ 2, 15, 16, 17, 19, 20. Yet, despite five years of work before the RRCA, an arbitrator and this Court, Kansas has never once offered an alternative solution that would address the fundamental problem. Tr. of 8-2012 hearing at 368 (Larson); *Id.* at 480 (Barfield). Nebraska's Five-Run Solution is the only solution before the Court that solves this problem. N1000 (Schneider Direct) ¶ 75.

There is no dispute that the existing Accounting Procedures are flawed. There is no dispute Nebraska's Five-Run Solution solves the problem presented. Nebraska's Five-Run Solution will ensure proper administration of the Compact, and should be approved by this Court.

II. KANSAS' REQUEST FOR AN ORDER TO COMPLY WITH THE FSS IS NOT WARRANTED.

Kansas has abandoned its demand to shut down 302,000 acres of irrigated land in Nebraska. Kansas

could not substantiate such a need. Kansas now simply seeks an Order compelling Nebraska to comply with the Compact in the future. Kansas Brief at 36-44 (Section II.B). While the Court has occasionally seen fit to issue injunctions in appropriate cases, this simply is not an appropriate case. Even if it were such a case, the generic form of injunction Kansas seeks is clearly improper.

Contrary to Kansas' reckless misrepresentation, Nebraska has not engaged in "a pattern of violations, repeatedly and knowingly violating the Compact." Kansas Brief at 37 and 43. Rather, there has been but a single violation in the Compact's 72 year existence. And that violation Nebraska promptly conceded and offered to cure. Since the violation occurred in 2006, Nebraska has substantially improved both its understanding of what must be done to comply with the provisions of the Compact (in light of the parties' 2002 agreement to include groundwater pumping impacts) and its ability to regulate and administer its water supplies in light of that impact. There is no credible threat of future violation.

As discussed at length in the Final Report, Nebraska has implemented sophisticated Integrated Management Plans ("IMPs") designed to forecast potential shortfalls, in accordance with ultra-conservative water supply assumptions, to guard against future violations. These plans allow Nebraska to employ fundamental principles of adaptive management to react to whatever conditions are presented in the future. The full force of State law, including

the powers of the Department of Natural Resources and the local controls overseen by Natural Resources Districts are brought to bear under these plans to ensure water is generated and made available to Kansas as required. The IMPs provide flexibility in the precise manner of compliance, but in the end, any plan implemented must be the hydrologic equivalent of curtailing the "Rapid Response Region" and shutting off all surface water supplies in the Basin to ensure water generated is not consumed in Nebraska on its way to Kansas Final Report at 122-27. Nebraska has been in compliance with the Compact since 2007 and no further violation has even been alleged.

In failing to persuade the Special Master otherwise, Kansas was unable actually to project a specific, future violation. Kansas responds it need not predict the future with precision to obtain relief, but in this case, Kansas could not even say such a violation was probable. Final Report at 120. This single salient fact overrides all others: The Plaintiff demanding an injunction cannot show a likelihood of a potential future violation (and thus injury). After three years of litigation and multiple "expert" analyses, Kansas showed little more than a mere apprehension of future injury; one not even based on Nebraska's existing water management regime. Final Report at 120. Because injunctions are designed to prevent future violations, rather than remedy past harms, Kansas lacks the most fundamental premise on which injunctive relief is based. All other arguments are immaterial.

In any event, even if Kansas had been able to muster a credible projection of future violations, the form of relief sought here is unavailable. Courts do not enter injunctive orders requiring parties to simply "obey the law." *Contrast* FED. R. CIV. P. 65(d)(1)(C) (requiring reasonable detail setting forth activity to be enjoined). Such "Obey Orders" are consistently eschewed because they are overbroad, fail to put the parties on notice of what is required to avoid a future violation, and are essentially meaningless because they merely affirm existing requirements. *See, e.g.*, *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114 (2d Cir. 2011) (vacating order requiring "full conformity with applicable laws pertaining to firearms"); *Anheuser-Busch, Inc. v. Stroh Brewery Co.*, 750 F.2d 631 (8th Cir. 1984) (vacating order that prevented party "from doing any other acts which are likely to cause confusion, mistake or deception"); *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41 (2d Cir. 1996) ("Broad, non-specific language that merely enjoins a party to obey the law or comply with an agreement does not give the restrained party fair notice of what conduct will risk contempt."); *Hughey v. JMS De. Corp.*, 78 F.3d 1523 (11th Cir. 1996) (vacating order requiring developer to avoid discharging stormwater "if such discharge would be in violation of the Clean Water Act.").[4] This is particularly true here,

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[4] Kansas relies on *Texas v. New Mexico*, 485 U.S. 388 (1988) as support for its request for an Obey Order here. However, the case is inapposite because the Court's order there to comply with Article III(a) of the Pecos River Compact incorporated a specific

(Continued on following page)

where the Compact simply requires Nebraska to limit its Computed Beneficial Consumptive Use to remain within its Allocations. Neither the Compact, nor the FSS, specify what Nebraska must do to ensure this occurs (i.e., whether through regulatory action, retirement of water rights, augmentation of water supplies, etc). An Obey Order would be meaningless and serve only to introduce additional confusion into the management of the Basin.

III. THERE IS NO JUSTIFICATION FOR DISGORGEMENT.

Relying on a host of unsubstantiated and recklessly false accusations, Kansas takes exception to the Special Master's disgorgement award of $1.8 million. Without precedent from this Court or any evidence to support its accusations, Kansas is opportunistically trying to maximize its monetary gains. The evidence plainly shows Nebraska did not intend to violate the Compact in 2006, does not have a pattern of violations, and spent significant resources to avoid the 2006 violation. Moreover, there is absolutely no evidence Nebraska has any intent to violate the Compact in the future. Indeed, Kansas identifies no evidence in its Exceptions to support the factual basis for these claims. Kansas' own inflated claims of its actual damages, which were wrongly based on

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water delivery obligation, as well as a detailed protocol for implementation.

evaporation from Harlan County Reservoir and Nebraska's improper consumption of imported water, merit denial of any disgorgement award.

A. Nebraska Did Not Intentionally, Knowingly, or "Opportunistically" Violate the Compact.

If enforcement of a Compact among States is to be treated as a contract between individuals as urged by Kansas, then disgorgement can only be proper "as an *alternative* to damages, in cases of *intentional* interference with legal entitlements." *See*, Restatement (3d) Restitution and Unjust Enrichment ("Restatement") § 39, cmt. a (emphasis added). As noted by the Restatement comments, "a breach of contract that satisfies the cumulative tests of § 39 is rare." *Id.* Kansas did not clear that bar in the eyes of the fact-finder as Special Master Kayatta observed, "there is no evidence that Nebraska deliberately opted for noncompliance in 2006." Final Report at 130.

1. The Evidence Shows Nebraska Made Significant Efforts to Comply with the Compact.

Kansas relies almost exclusively on the Special Master's use of the term "knowing" in referring to Nebraska's "expos[ing] Kansas to a substantial risk that Nebraska's compliance measures would not ensure compliance if the weather did not cooperate" to persuade the Court that Nebraska's behavior was

"opportunistic" such that it warrants disgorgement of profits. Kansas Brief at 46-47. Although Nebraska has always acknowledged that it violated the Compact in 2006, there is no evidence to suggest Nebraska deliberately acted to violate the Compact. None. To the contrary, the record proves Nebraska made an honest effort to do what it could to comply in the face of the worst drought on record.

Nebraska undertook significant legislative and regulatory efforts to ensure it complied with the Compact immediately following approval of the Final Settlement Stipulation. As the Special Master found: "Nebraska reduced total ground water pumping from just over 1,400,000 acre-feet in 2002 to approximately 1,200,000 acre-feet in 2003, then to just over 1,000,000 acre-feet in 2004; and then to approximately 900,000 acre-feet in 2005 and slightly below that in 2006." Final Report at 111.

In addition to the reduction in groundwater pumping, Nebraska overhauled its state water laws directly in response to its new obligations under the FSS. In addition to these new regulatory efforts, "Nebraska spent $18,722,500 to purchase approximately 98,368 acre-feet of water from surface water irrigation districts" to prevent consumption in Nebraska and delivery to Kansas. Final Report at 176. As noted by the Special Master, all of these efforts "belie a conclusion that Nebraska sought to violate the Compact" or will seek to do so in the future. *Id.* at 111-12.

Completely ignoring Nebraska's efforts, Kansas seems to imply that evidence of intent is unnecessary to establish an "opportunistic breach." Kansas Brief at 48 ("the label suggests the reasons why a breach of this character is condemned, but there is no requirement under this section that the claimant prove the motivation of the breaching party.").

2. Kansas Fails to Understand Its Burden.

Kansas misapprehends the Restatement's meaning in the use of the word "motivation." Restatement § 39, cmt. b. For in the very next line of the comment, the Restatement provides that § 39 "condemns a form of conscious advantage-taking that is the equivalent, in the contractual context, of an intentional and profitable tort." Thus, it is not that proving intent to breach the contract is unnecessary, but rather the proof of the party's reasons for intending to breach which is relieved. "The scope of [§ 39] is further restricted by the requirement that the breach be deliberate – thereby excluding cases in which breach results from the defendant's inadvertence, negligence, or unsuccessful attempt at performance." Restatement § 39, cmt. f.

After a comprehensive review of the record, the Special Master summed up Nebraska's pre-2007 compliance efforts as being "earnest and substantial enough to preclude a finding that this was a consciously opportunistic breach." Final Report at 131. Kansas can cite no evidence to the contrary.

B. Kansas is Not Entitled to Disgorgement to Protect Against Future Non-Compliance.

Kansas charts new ground when it argues a sovereign state should be subjected to disgorgement because Nebraska can "breach [the Compact] whenever it is economically advantageous" to do so. Kansas Brief at 47. Kansas' inflammatory rhetoric aside, there is no evidence to even hint that Nebraska violated the Compact in 2006 because it was economically advantageous to do so. Nor is there any evidence to suggest Nebraska would do so in the future.

Kansas nevertheless persists, suggesting that "[a]n upstream state like Nebraska is in a position to exploit the structural imbalance inherent in that situation and profit from an 'opportunistic breach' for which disgorgement is an appropriate remedy." Kansas Brief at 48. Kansas misconstrues the law of restitution; "[c]ases in which restitution reaches the profits from a breach of contract are those in which the promise's contractual position is vulnerable to abuse." Restatement § 39, cmt. b. The geographic positioning of Nebraska vis à vis Kansas is not evidence that Kansas' *contractual* position is vulnerable to abuse; the Compact and the FSS are the product of a bargain entered into between the two parties.

"Vulnerability in this context stems from the difficulty that the promisee may face in recovering, as compensatory damages, a full equivalent of the performance for which the promisee has bargained."

Restatement § 39, cmt. b. So long as actual damages are accounted for, the law does not seek to deter efficient breach by forcing one party to pay more. *Patton v. Mid-Continent Sys., Inc.*, 841 F.2d 742, 751 (7th Cir. 1988) (citing *Yanan & Associates, Inc. v. Integrity Ins. Co.*, 771 F.2d 1025, 1034 (7th Cir. 1985)).

Kansas does not explain how the recommended compensatory damages fail to constitute the "full equivalent of the performance" for which it bargained. In this case, as in virtually every case involving damages for breach of an interstate compact, expert testimony from economists, farmers, and governmental officials was presented to establish the damages suffered by the non-breaching party. Kansas has not established how its contractual entitlement receives inadequate protection under traditional contract remedies. In fact, the Special Master, relying on expert testimony from all parties, calculated the actual damages suffered by Kansas as a result of Nebraska's violation. "If the promisee's contractual entitlement is adequately compensated by an award of damages, there is no remedial vulnerability to be exploited, no opportunism, and no unjust enrichment." Restatement § 39, cmt. b.

Ultimately any kind of deterrent is unnecessary under the present circumstances. The Special Master correctly determined that "Kansas has not carried its burden of establishing a 'cognizable danger of recurrent violation.'" Final Report at 182 (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). The Special Master went on to note that he "found

Nebraska's officials who testified at the hearing credible and earnest in their expression of commitment to complying with the Compact." Final Report at 183. Kansas' alleged concerns for future compliance are, therefore, without any basis in fact.

C. No Taking Occurred to Justify Disgorgement.

Kansas alternatively suggests the 2006 violation "involved the intentional taking of water with a consequent impact on downstream water rights." Kansas Brief at 50. To be sure, the Special Master identified the "important characteristics" of the Compact given that it "represents an attempt to delineate consensually two sovereigns' rights to water." Final Report at 131. The Special Master reasoned that because "[a]ctions involving the taking of real property routinely apply disgorgement as the measure of damages," such a remedy may be appropriate under the present circumstances. *Id.* at 131-132 (citing § 40 of the Restatement). Although the Special Master postulates that "one might fairly say that Nebraska took Kansas' water," closer examination reveals disgorgement on this basis is inappropriate.

Section 40 of the Restatement (comment b) provides: "When restitution by the rule of this section takes the form of a money judgment, the measure of recovery often depends on the blameworthiness of the defendant's conduct." Thus, like the prior claim for

disgorgement based on opportunistic breach, disgorgement for taking of real property calls for a showing of deliberation or intention on the part of Nebraska. As discussed above, Kansas has failed in this regard.

While Kansas asserts the broad proposition that "[w]ater rights in an interstate river are real property rights" is a foregone conclusion, such proposition is left unsubstantiated upon review of the authorities cited in support. Kansas Brief at 50 (citing *Fed. Power Comm'n v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252 (1954); *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945); 93 C.J.S. Waters § 2; 78 Am. Jur. 2d Waters § 6; Kan. Stat. Ann. § 82a-701(g); Neb. Rev. Stat. § 46-510). Because the nature of interstate water rights remains uncertain and the record contains no evidence that Nebraska deliberately interfered with such rights, should they be found to exist, disgorgement based on § 40 of the Restatement is unwarranted.

D. Nebraska Did Not Breach a Fiduciary Duty to Kansas.

Lastly, Kansas opines that because of Nebraska's upstream location "[t]he relationship between Nebraska and Kansas under the Compact is like a fiduciary relationship" requiring Nebraska to serve as steward to downstream-Kansas. Kansas Brief at 51.

This Court has never identified any sort of fiduciary duty arising under a compact. *Cf. Alabama v. North Carolina,* 560 U.S. 330, 351 (2010) (no implied duty of good faith and fair dealing in interstate compact). Assuming arguendo that a duty equivalent to that of a fiduciary can apply to a state, the record again fails to contain any evidence that Nebraska did not "exercise her right reasonably and in a manner calculated to conserve the common supply." Kansas Brief at 51 (citing *Wyoming v. Colorado*, 259 U.S. 419, 484 (1922), vacated on joint motion by parties, 353 U.S. 953 (1957)). Moreover, the language quoted from the Court's opinion in *Wyoming v. Colorado* concerned the implementation of the doctrine of prior appropriation, not the interstate water compact.

E. There is No Basis for "Treble Damages"

Admitting fully there is no evidentiary foundation on which to base an augmented monetary damage award, Kansas arbitrarily selects "treble damages" as a basis for suggesting Nebraska pay over some $11.1 million (the $3.7 million actual damages recommendation tripled). As Nebraska has already explained in its Brief in Support of Exceptions, there is no basis of any kind for awarding more than $3.7 million (Kansas estimated actual damages) in this case.

In any event, as Kansas recognizes, treble damages are typically awarded under statutory provisions providing for the same. No such statute exists here.

Further, the Court's "cases have placed different statutory treble-damages provisions on different points along the spectrum between purely compensatory and strictly punitive awards." *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 406 (2003). And, "[t]he very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). Under the facts presented, these justifications do not merit a treble award.

The Special Master correctly found that Kansas can be fully compensated for its actual injury by an award of $3.7 million. Given the Special Master's findings concerning Nebraska's lack of bad faith, there is no basis for a punitive award. Finally, given the Special Master's findings that Nebraska's compliance efforts are sound, Nebraska need not be incentivized to comply in the future.[5]

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[5] Nebraska objects to Kansas' false assertion that Nebraska only responds to litigation brought against it. Kansas Brief at 43. As the record reflects, Nebraska substantially revised its IMPs to address deficiencies found by the Arbitrator in 2009, long before Kansas allegedly "had no choice" but to file this litigation. Final Report at 113. To be clear, it is those very changes that Special Master Kayatta has determined to be sufficient to eliminate a tangible threat of future violations. These are the same changes Kansas summarily ignored throughout this litigation and incredibly maintains should not even be taken into account when evaluating the likelihood of future violations.

CONCLUSION

For the reasons stated above, Nebraska respectfully requests that all of Kansas' exceptions be denied.

Respectfully submitted,

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